IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Deflecto, LLC, Plaintiff,	)	
vs.	)	
Dundas Jafine Inc., Defendant.	)	Civil Action No. 4:13-cv-00116-ODS

DEFENDANT DUNDAS JAFINE'S SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION *IN LIMINE* NO. 10 REGARDING DR. FADDIS

Deflecto is concerned that Dr. Faddis will attempt to opine on willfulness or the patent process. Dr. Faddis is offered as Dundas Jafine's technical expert. He will not attempt to opine on issues which are not within his realm of expertise, including willfulness and the patent process. But these topics are broad and could be argued to encompass far more than *opinions* on each.

With the patent process, Dr. Faddis has personal knowledge with how the process generally works – as he is a named inventor on several patents. Dundas Jafine does not intend to walk Dr. Faddis through how that patent process works or what is entailed—that is better left to the USPTO's non-biased video. Dr. Faddis may discuss portions of the patents-in-suit and the prosecution histories of each and provide his interpretation of the same based on his qualification as one of ordinary skill in the art. To the extent Deflecto claims that is testifying as to the patent process, Dundas Jafine disagrees. Such testimony is proper for a technical expert.

Also, it is clear that experts are allowed to testify as to how they came to their opinions and the basis for those opinions. This includes testifying as to the legal standard that counsel informed the expert to use. Dr. Faddis will not opine on the law, but he may testify to the law he was provided that serves as the foundation of his opinions regarding infringement and invalidity. This is proper testimony from a technical expert. But to the extent Deflecto argues such testimony qualifies as Dr. Faddis opining on legal standards, Dundas Jafine disagrees. Such an argument is contrary to law governing expert testimony. *See e.g.*, *Lake v. McCollum*, 295 S.W.3d 529, 533 (Mo. App. W.D. 2009) (citing *Ladish v. Gordon*, 879 S.W.2d 623 (Mo. App. W.D. 1994) (explaining that "[c]are should be taken by counsel in every case, with every expert witness, to make sure the expert is properly oriented with regard to the [legal standard]. It is not enough that the jury instruction…informs the jury of the meaning….It is necessary in each case that the fact finder be informed as to whether the witness, in offering opinions, is using the standard prescribed by law and not some other standard....It is not necessary that the legal standard be recited in ritualistic fashion, but generally it must appear somewhere in the context of the expert's testimony that the proper objective legal standard is the standard being employed by this expert in his or her testimony").

Finally, in patent cases, it is appropriate for technical experts to opine on the ultimate issues of non-infringement and invalidity of the patents-in-suit. An expert's opinion is not objectionable just because it embraces an ultimate issue. Fed. R. Evid. 704. In fact, testimony on the ultimate issues of infringement and validity is permissible in patent cases. *See e.g.*, *Symbol Techs., Inc. v. Opticon, Inc.*, 935 F.2d 1569, 1575 (Fed. Cir. 1991).

Therefore, Deflecto's motion *in limine* should be denied to the extent it is contrary to law.

Dated: December 8, 2015

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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ATTORNEYS FOR DEFENDANT
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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2015, I electronically filed the foregoing with the Court by using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ *Brittany A. Boswell*